No. 15-5238

In The
Supreme Court of the United States

LESTER RAY NICHOLS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Sex Offender Registration and Notification Act ("SORNA") requires a sex offender who changes his residence to appear in person to register or keep his registration current not later than three business days after the change of residence in at least one jurisdiction where the offender presently resides, works, or attends school. A foreign country is not a jurisdiction under SORNA. 42 U.S.C. §§ 16911(10) & 16913(a), (c).

A federal sex offender who is required to register under SORNA and who knowingly fails to register or update his registration as required by SORNA violates 18 U.S.C. § 2250(a).

The question presented is:

Whether it is a federal crime under 18 U.S.C. § 2250(a) for a registered sex offender who moves from the United States to a foreign country to fail to update his registration with this change of residence in his former jurisdiction within the United States.

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OPINIONS BELOW

The opinion of the court of appeals affirming Mr. Nichols's conviction is published at 775 F.3d 1225 (10th Cir. 2014). J.A. 117. The opinion denying rehearing en banc is published at 784 F.3d 666 (10th Cir. 2015). J.A. 134. The district court's order denying Mr. Nichols's motion to dismiss the indictment is unpublished. J.A. 54.

JURISDICTION

The court of appeals entered judgment on December 30, 2014, and denied a timely petition for rehearing en banc on April 15, 2015. J.A. 134. Mr. Nichols filed a timely petition for writ of certiorari on July 14, 2015. This Court granted the petition, limited to Question 1, on November 6, 2015. J.A. 159. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns a prosecution under 18 U.S.C. § 2250. The full text of § 2250 is reproduced in the statutory appendix annexed to this brief. The statutory appendix also includes four other relevant provisions from the Sex Offender Registration and Notification Act:

42 U.S.C. § 16901 (Declaration of purpose)

42 U.S.C. § 16911 (Relevant definitions)

42 U.S.C. § 16913 (Registry requirements for sex offenders)

42 U.S.C. § 16928 (Registration of sex offenders entering the United States)

STATEMENT OF THE CASE

In 2006, Congress enacted the Sex Offender Registration and Notification Act ("SORNA"), Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (42 U.S.C. § 16901 *et seq.*). SORNA requires a sex offender to register, and to keep the registration current, in at least one jurisdiction where the offender resides, works, or attends school. 42 U.S.C. § 16913(a). If a sex offender changes his residence, SORNA requires the offender, not later than three business days after the change of residence, to appear in person in at least one jurisdiction involved and to inform the jurisdiction of the change of residence. 42 U.S.C. § 16913(c). An "involved" jurisdiction is one where the offender resides, works, or attends school. *Id.* (cross-referencing 42 U.S.C. § 16913(a)). A foreign country, however, is not a covered jurisdiction under SORNA. 42 U.S.C. § 16911(10).

SORNA is designed to track sex offenders who live in the United States. *See, e.g.*, 42 U.S.C. § 16901 (establishing a "national" sex offender registry); *Carr*

v. United States, 560 U.S. 438, 454 (2010) (linking the problem of "missing" offenders to "interstate travel"). Consistent with this design, sex offenders who enter the United States are subject to SORNA's provisions. 42 U.S.C. § 16928. No similar provision addresses SORNA's application to offenders who leave the United States.

Below, the Tenth Circuit nonetheless held that Mr. Nichols violated 18 U.S.C. § 2250(a) – the provision that punishes a sex offender who fails to "update a registration as required by [SORNA]" – when he moved to the Philippines without first appearing in person to update his registration in Kansas. J.A. 125. In particular, it held that Mr. Nichols had an obligation to report the change of residence to Kansas authorities under 42 U.S.C. § 16913(a) and (c). J.A. 121-125. The Tenth Circuit's decision solidified a conflict among the Circuits. That conflict is now before this Court for resolution.

A. Statutory Background

1. The first comprehensive sex offender registries originated in the state legislatures, not Congress. California established the first such registry in 1947. Wayne A. Logan, *Knowledge as Power: Criminal Registration and Community Notification Laws in America*, 31 (Stanford Univ. Press 2009). By 1989, only ten states had registry systems aimed exclusively at sex offenders. *Id.* This number increased dramatically in the early 1990s, when numerous

state legislatures enacted sex offender registry laws in response to a number of high-profile crimes against children. *Id.* at 49-55.

2. In 1994, Congress passed the first federal sex offender registration legislation, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("Wetterling Act"). Pub. L. No. 103-322, 108 Stat. 1796, 2038 (1994) (codified at 42 U.S.C. § 14071). The Wetterling Act did not create a federal crime for failure to register as a sex offender. Instead, it encouraged states, as a condition of receiving federal funds, to establish sex offender registry laws meeting certain minimum standards. 42 U.S.C. § 14071(a)(1), (b), (d) (1994); *Carr*, 560 U.S. at 452. In general, the Wetterling Act directed states to require initial registration of current addresses and registration of new addresses within ten days of establishing a new residence. 42 U.S.C. § 14071(a)(1), (b) (1994). If the new residence was in a different state, the states were directed to require sex offenders to register in the new state, not the old state (assuming the new state had a registry). *Id.* The Wetterling Act had no extra-territorial reach, nor did any of its provisions refer to foreign countries.

3. By 1996, every state had a sex offender registry. *Smith v. Doe*, 538 U.S. 84, 89-90 (2003). In that year, Congress amended the Wetterling Act when it enacted the Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, § 2, 110 Stat. 3093 (codified at 42 U.S.C. § 14072). The Lychner Act established a database

of registered sex offenders at the FBI. 42 U.S.C. § 14072(b). It also required sex offenders in states with non-compliant sex offender registries to register a current address with the FBI. *Id.* For these offenders, the Lychner Act mirrored the Wetterling Act's change-of-address registration requirements (registration in the new state within ten days of moving). 42 U.S.C. § 14072(g). It also directed any state agency notified by the sex offender of a change of residence to further notify law enforcement officials in the jurisdiction "to which, and the jurisdiction from which, the person has relocated." 42 U.S.C. § 14072(g)(4), (5). Like the Wetterling Act, the Lychner Act had no extra-territorial reach, nor did any of its provisions refer to foreign countries.

Unlike the Wetterling Act, the Lychner Act created a federal crime for failure to register in any state where the offender "resides, is employed, carries on a vocation, or is a student," but it limited the reach of federal criminal liability to offenders who lived in states that did not have federally compliant registries, federal offenders, persons sentenced by courts martial, and offenders crossing state borders. *Id.* (creating 42 U.S.C. § 14072(i) (1996)); *see also* Department of Justice Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, § 101(b) [Tit. I, § 123(3)], 112 Stat. 2681-73 (amending subsection (i) but not expanding its reach to other offenders). Other offenders who failed to register in accordance with state registry laws were still subject to state prosecution. 42 U.S.C. § 14071(d).

4. Soon thereafter, Congress again amended the Wetterling Act to direct state registries to require a sex offender who moves to a different state to report the change of residence not only to the new state but also to the state "the person is leaving" (i.e., a "departure notification" requirement). Department of Justice Appropriations Act, 1997, Pub. L. No. 105-119, Tit. I, § 115(a)(1), 111 Stat. 2461 (42 U.S.C. § 14071(b)(5)) (1997). In states that codified this latter requirement, an offender's failure to abide by it could result in state prosecution, but not in federal prosecution. 42 U.S.C. § 14071(d); *see Carr*, 560 U.S. at 452-453.

5. By 2006, every state required offenders who moved to notify their former jurisdiction, to notify (and register with) their new jurisdiction, or, in many cases, both. Some states required offenders to give pre-departure notification,[1] while others required offenders to give post-departure notification.[2] Two

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[1] Ala. Code § 15-20-23(a) (2005); Ark. Code Ann. § 12-12-909(c) (2001); Fla. Stat. § 943.0435(7) (2005); 730 Ill. Comp. Stat. Ann. 150/3 (2006); Ky. Rev. Stat. Ann. § 17.510(10)(b)(1) (2000); Mass. Gen. Laws ch. 6, § 178E(i) (2003); Mich. Comp. Laws Ann. 28.725 Sec. 5(3) (2005); Minn. Stat. Ann. § 243.166 Subd. 3(b) (2005); N.J. Stat. Ann. § 2C:7-2(d) (2004); N.M. Stat. Ann. § 29-11A-4.1 (2005); N.D. Cent. Code § 12.1-32-15(7) (2005); Ohio Rev. Code Ann. § 2950.05(A) (2004); Okla. Stat. tit. 57, § 584(D) (2005); Tex. Code Crim. Proc. Ann. Art. 62.055(a) (2005); Va. Code Ann. § 9.1-903(D) (2005); Wis. Stat. Ann. § 301.45(4m) (2006). The specifics of the statutes differ in various respects.

[2] Alaska Stat. § 12.63.010(c) (1998); Ariz. Rev. Stat. § 13-3822(B) (2005); Cal. Penal Code § 290(f)(1)(a) (2005); Colo. Rev. Stat. § 16-22-108 (2004); Conn. Gen. Stat. §§ 54-252(b), 54-253(b),

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states also required sex offenders to give notification of moves to foreign countries. West Virginia required pre-departure notification of such a move. W. Va. Code § 15-12-7 (2004) (requiring a sex offender "who intends to move to another state or country" to "at least ten business days prior to such move notify the state police of his or her intent to move and of the location to which he or she intends to move."). The state of Washington required post-departure notification. Wash. Rev. Code § 9A.44.130(4)(a)(ix) (2003) (requiring an offender to "send written notice within ten days of moving to the new state or to a foreign country to the county sheriff with whom the person last registered in Washington state.").

6. a. In 2006, Congress repealed the Wetterling Act in favor of SORNA. Adam Walsh Child Protection and Safety Act ("the Adam Walsh Act"),

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54-254(b) (2002); Del. Code Ann. tit. 11, § 4120(f)(2) (2002); Ga. Code Ann. § 42-1-12(b)(4)(C) (2005); Haw. Rev. Stat. § 846E-6(a) (2005); Idaho Code Ann. § 18-8309(2) (2006); Ind. Code Ann. § 5-2-12-8(a) (2005); Iowa Code § 692A.3(4) (2000); Kan. Stat. Ann. § 22-4904(b) (2003); La. Rev. Stat. Ann. § 15:542.1(J)(1) (2006); Md. Code Ann., Crim. Proc. § 11-705(d) (2005); Mo. Rev. Stat. § 589.414(2) (2003); Mont. Code Ann. § 46-23-505 (2005); Nev. Rev. Stat. Ann. § 179D.250(1) (2001); N.H. Rev. Stat. Ann. § 651-B:5(I) (2002); N.Y. Correct. Law § 168-f(4) (2003); N.C. Stat. § 14-208.9(b) (2002); Or. Rev. Stat. Ann. § 181.595(3)(b) (2005); 42 Pa. Cons. Stat. Ann. § 9795.2(2)(i) (2004); R.I. Gen. Laws § 11-37.1-9(b) (2003); S.C. Code Ann. § 23-3-460 (2005); S.D. Codified Laws § 22-24B-12 (2006); Tenn. Code Ann. § 40-39-203(a)(2) (2006); Utah Code Ann. § 77-27-21.5(9)(a), (b) (2002); Vt. Stat. Ann. tit. 13, § 5407(a)(3) (2006); Wyo. Stat. Ann. § 7-19-302(e) (2005). These statutes also differ in various respects.

Pub. L. No. 109-248, Tit. 1, 120 Stat. 587 (2006); 42 U.S.C. § 16901 *et seq.*; *Reynolds v. United States*, 132 S.Ct. 975, 978 (2012). SORNA's stated purpose is to establish a "comprehensive national" sex offender registry. 42 U.S.C. § 16901. Like the Wetterling Act, SORNA attempts to achieve this purpose by setting minimum registration standards and withholding federal funds from states that do not "substantially implement" those standards. 42 U.S.C. § 16925; *Reynolds*, 132 S.Ct. at 978; *see also United States v. Kebodeaux*, 133 S.Ct. 2496, 2504-2505 (2013) (Congress "did not insist that the States" adopt SORNA's provisions.).

b. SORNA "somewhat modified" the Wetterling Act's minimum registration requirements. *Kebodeaux*, 133 S.Ct. at 2504. A sex offender must still register and keep his registration current in jurisdictions where "the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. § 16913(a). If an offender changes his residence, employment, or student status, he now has three business days (shortened from ten days) "after each change" to "appear in person in at least 1 jurisdiction involved" and to report changes in this information. *Compare* 42 U.S.C. § 14071(b)(5) (1994), 42 U.S.C. § 14072(g)(3) (2000), & 42 U.S.C. § 14072(i)(3), (i)(4) (2000), *with* 42 U.S.C. 16913(a), (c). A "jurisdiction involved" is one where the offender "resides," works, or attends school. 42 U.S.C. § 16913(c) (cross-referencing 42 U.S.C. § 16913(a)). "Resides" is now defined as "the location of the individual's home or

other place where the individual habitually lives." 42 U.S.C. § 16911(13).

c. Like the Wetterling Act, SORNA has no extra-territorial application. A "jurisdiction" covered by SORNA does not include a foreign country. 42 U.S.C. § 16911(10). Moreover, SORNA instructs the Attorney General and the Secretaries of State and Homeland Security to establish and maintain a notification system for offenders "entering the United States." 42 U.S.C. § 16928. There is no similar notification system for individuals "leaving the United States."

d. Unlike the Wetterling Act as amended, SORNA does not require a sex offender to report a change of residence to the jurisdiction "the person is leaving." *Compare* 42 U.S.C. § 16913, *with* 42 U.S.C. § 14071(b)(5) (1998 ed.). Instead, when an offender updates his registration in his new jurisdiction, it is that jurisdiction, and not the offender, that is required to provide the updated information to a number of entities, including all other jurisdictions in which the offender is required to register, 42 U.S.C. § 16913(c), and "each jurisdiction from or to which a change of residence, employment, or student status occurs," 42 U.S.C. § 16921(b)(1), (3).

Under SORNA, the states still play a critical role in tracking sex offenders. The FBI's national database is comprised of sex offenders required to register in state sex offender registries. 42 U.S.C. § 16919(a). The states and other covered jurisdictions are also

required to make available on the Internet detailed information about each sex offender in its registry. 42 U.S.C. § 16918(a).

e. The states retain a significant role in the enforcement of sex offender registry laws. Each state must provide a state criminal penalty for failure to comply with state sex offender registry obligations. 42 U.S.C. § 16913(e). The state penalty must carry a statutory maximum of at least one year in prison. *Id.* In SORNA, Congress actually returned more control to the states by eliminating the federal provisions and penalties for offenders who lived in states that did not have federally compliant registries. The perceived gap that those provisions and penalties were designed to fill was no longer present, "presumably because, by the time of [SORNA's] enactment, 'every State . . . had enacted some' type of registration system." *Carr*, 560 U.S. at 453 n.7. Leaving enforcement of state registries to the states, SORNA only "punishes violations of *its* requirements (instead of violations of state law)." *Kebodeaux*, 133 S.Ct. at 2505 (emphasis added).

Specifically, SORNA punishes any federal sex offender who is required to register under SORNA and who fails to register or update his registration "as required by [SORNA]." 18 U.S.C. § 2250(a)(2)(A). SORNA also punishes a sex offender who is required to register under SORNA, who "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country," and who thereafter fails to register or update a registration "as required by" SORNA.

18 U.S.C. § 2250(a)(2)(B); *Carr*, 560 U.S. at 446. The federal penalty carries a statutory maximum of ten years in prison, 18 U.S.C. § 2250(a), with increased penalties for offenders who commit crimes of violence, 18 U.S.C. § 2250(c).

7. a. In July 2008, the Justice Department issued guidelines to "provide guidance and assistance to the states and other jurisdictions in incorporating the SORNA requirements into their sex offender registration and notification programs." The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030-01 at 38030 (July 2, 2008) ("guidelines"), *implementing* 42 U.S.C. § 16912(b). The guidelines recognize that SORNA sets "minimum standards" for state registries and that states and other jurisdictions are free to exceed those minimum standards with requirements of their own. *Id.* at 38033, 38044, 38046.

For instance, the guidelines expressly acknowledge that a jurisdiction may require more stringent registration requirements, such as "requiring that changes of residence be reported before the sex offender moves, rather than within three business days following the move." *Id.* at 38046. The guidelines then instruct jurisdictions to require a sex offender "to inform the jurisdiction if the sex offender intends to commence residence, employment, or school attendance in another jurisdiction" or "outside of the United States." 73 Fed. Reg. 38030-01 at 38065, 38067. If so informed, the jurisdiction must inform all other jurisdictions in which the sex offender is

required to register, as well as the United States Marshals Service, so that the national databases can be updated. *Id.*

b. With respect to foreign changes in residence, the guidelines cite 42 U.S.C. § 16913(a), 42 U.S.C. § 16928, and 18 U.S.C. § 2250, and explain that the DOJ "needs to know" if sex offenders leave the country "since such offenders will be required to resume registration if they later return to the United States." 73 Fed. Reg. 38030-01 at 38067. Yet, the guidelines also explain that this departure notification requirement need not be done "in person" under § 16913(c) because that provision involves only changes of residence "between jurisdictions or within jurisdictions." *Id.* "The means by which sex offenders are required to report other changes in registration information discussed in this Part are matters that jurisdictions may determine in their discretion." *Id.*

The guidelines further recognize that "a sex offender who moves to a foreign country may pass beyond the reach of U.S. jurisdictions and hence may not be subject to any enforceable registration requirement under U.S. law unless and until he or she returns to the United States." 73 Fed. Reg. 38030-01 at 38066. Finally, the guidelines make clear that SORNA never requires continued registration in a jurisdiction if the sex offender does not reside, work,

or attend school in that jurisdiction. *Id.* at 38061, 38065.[3]

8. Kansas is one of seventeen states that the Justice Department presently identifies as SORNA compliant.[4] It requires sex offenders to notify state officials within three business days of any "change or termination of residence location." Kan. Stat. Ann. § 22-4905(g). Kansas also requires sex offenders to provide departure notification of international travel (but not international changes in residence), consistent with the Justice Department's supplemental guidelines. Kan. Stat. Ann. § 22-4905(o); note 3, *supra*. Kansas prosecutes all but mere fee-payment violations of the Kansas registration laws as felonies. Kan. Stat. Ann. § 22-4903.

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[3] In 2011, the Justice Department issued supplemental guidelines concerning international travel for registered sex offenders living in the United States. Supplemental Guidelines for Sex Offender Registration and Notification ("supplemental guidelines"), 76 Fed. Reg. 1630-01 (Jan. 11, 2011). The supplemental guidelines direct jurisdictions to require sex offenders to give notice of any intended international travel 21 days in advance, although this rule is flexible. *Id.* at 1633. The stated authority for this directive is 42 U.S.C. § 16914 ("Information required in registration"), not § 16913 or § 16928. *Id.* In doing so, the supplemental guidelines readily acknowledge that "[t]he Attorney General has no authority to repeal or amend Federal or States laws by issuing guidelines." *Id.* at 1631-1632.

[4] http://www.smart.gov/newsroom_jurisdictions_sorna.htm (last accessed December 15, 2015).

B. Factual Background

In 2003, Lester Nichols was convicted of a sex offense under 18 U.S.C. § 2423. J.A. 118. He served a term of imprisonment and was released from prison in March 2012. While on supervised release, Mr. Nichols registered as a sex offender in Kansas and updated that registration every three months, including in October 2012. J.A. 54-55, 119. In November 2012, Mr. Nichols moved from Kansas to the Philippines. *Id.* He did not notify the Kansas authorities before or after this change of residence. In December 2012, Mr. Nichols was arrested in the Philippines, deported to California, and transported to Kansas to face the charge in this case. *Id.*

C. Proceedings in the District Court

In June 2013, a federal grand jury in Kansas returned a one-count indictment against Mr. Nichols, charging him with failure to update his sex offender registration in November 2012, in violation of 18 U.S.C. § 2250(a). J.A. 11. In October 2013, Mr. Nichols moved to dismiss the indictment. He asserted, *inter alia*, that SORNA did not require him to register as a sex offender in the Philippines or to update his Kansas registration to reflect his move to the Philippines. J.A. 13.

The district court denied Mr. Nichols's motion, finding itself bound by the Tenth Circuit's decision in *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011). J.A. 58. Relying on *Murphy*, the district court

determined that Mr. Nichols violated SORNA when he did not update his registration in Kansas after he "abandoned" his Kansas residence but before he departed the country for the Philippines. *Id.*

Thereafter, Mr. Nichols entered into a conditional guilty plea, preserving the right to appeal the denial of his motion to dismiss. J.A. 84. Ultimately, the district court sentenced Mr. Nichols to a ten-month term of imprisonment, to be followed by a five-year term of supervised release. J.A. 105-106. Mr. Nichols currently resides in Wichita, Kansas, where he is serving the last few years of his term of supervised release.

D. Proceedings in the Court of Appeals

The Tenth Circuit affirmed Mr. Nichols's conviction in a published decision. J.A. 117. Like the district court, the panel found itself bound by *Murphy*. J.A. 125. It concluded: "[b]y boarding a plane to the Philippines, Mr. Nichols abandoned his residence in Kansas – a 'jurisdiction involved.' This change in residence triggered a registry obligation in Kansas, which Mr. Nichols did not fulfill." J.A. 125.

Murphy involved an analogous situation: a sex offender failed to update his registration in Utah when he moved to Belize. 664 F.3d at 799-800. The Tenth Circuit, over a dissent by Judge Lucero, held that the defendant was required to update his Utah registration when he "abandoned" his Utah residence,

even though he did not relocate within Utah. *Id.* at 800.

In *Murphy*, the Tenth Circuit determined that the appeal turned on the phrase "jurisdiction where the offender resides" in § 16913(a), and "residence" in § 16913(c). 664 F.3d at 800. It held that the two concepts are different, although in a footnote it concluded that the "two separate concepts [] are defined in the same way by the same term." *Id.* at 801 n.1. Citing "the logic of the statute," the Tenth Circuit held that a change of "residence" triggers a reporting obligation to the jurisdiction where the defendant "resides," and that this reporting obligation does not depend on whether the defendant "remains unemployed, out of school, or leaves the country." *Id.* at 801.

The Tenth Circuit gave three reasons for its "logic of the statute" determination: (1) "abandoning one's living place constitutes a change in residence under SORNA"; (2) when an offender leaves a residence in a state and then leaves the state entirely, the state remains a "jurisdiction involved" "so long as the offender was still a resident of the state when the abandonment occurred"; and (3) a reporting obligation does not disappear because an offender relocates to a non-SORNA jurisdiction before the three-business-day deadline elapses, as "the obligation to update a registration attaches to the sex offender as soon as a change in status occurs." *Id.* at 801-803.

Judge Lucero's dissent in *Murphy* found the majority's holding "indefensible" as a matter of statutory

interpretation and of common sense. *Id.* at 805. Judge Lucero disagreed that the defendant had an obligation to report his change of residence to Utah because at no point in time did the defendant change his residence within Utah, nor was Utah a "jurisdiction involved" once the defendant "abandoned" his residence. *Id.* Judge Lucero asked how the defendant could reside in Utah if he no longer had a residence in Utah. *Id.* at 806. Judge Lucero rejected the majority's conclusion that an individual could reside in a state merely because he was present in the state, where he no longer had a habitual residence within the state. *Id.* He found unwarranted the majority's decision to give inconsistent definitions to the terms "resides" and "residence." *Id.*

In a short concurrence in Mr. Nichols's case, Judge McKay disagreed with *Murphy*, agreed with Judge Lucero's dissent in *Murphy* and the Eighth Circuit's decision in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013), and urged the Tenth Circuit to rehear the case en banc. J.A. 132.

In *Lunsford*, the Eighth Circuit expressly disagreed with the Tenth Circuit's decision in *Murphy* and held that a sex offender who moves to a foreign country need not update his sex offender registration in his former jurisdiction.[5] 725 F.3d at 861-862. The

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[5] If not otherwise clear, we use the phrase "former jurisdiction" in this brief to refer to the jurisdiction where an offender last registered as a sex offender.

Eighth Circuit held that the defendant in *Lunsford* had no obligation to update his Missouri registration after his move to the Philippines because he no longer resided in Missouri and, thus, Missouri was no longer a "jurisdiction involved" for purposes of § 16913(a). 725 F.3d at 861. Because an offender need only update a registration in a jurisdiction in which he "resides," not a jurisdiction in which he "resided," the defendant in *Lunsford* had no obligation to update his Missouri registration when he moved to the Philippines. *Id.* at 861-862.

By a vote of 8 to 4,[6] the Tenth Circuit, in a published order, declined to rehear Mr. Nichols's case en banc. J.A. 134. In dissent, Judge Lucero noted his continued belief that *Murphy* was wrongly decided and that the Eighth Circuit correctly decided *Lunsford*. J.A. 135.

SUMMARY OF THE ARGUMENT

I. Whether Lester Nichols can be prosecuted under 18 U.S.C. § 2250 for a failure to register or update his sex offender registration turns on this Court's interpretation of 42 U.S.C. § 16913. Section 16913 does not require a sex offender who moves to a foreign country to keep his registration current in his former jurisdiction. The provision's text plainly

[6] Judge McKay, who is on senior status, elected not to participate in the en banc proceedings. J.A. 25.

requires the sex offender to register and to keep the registration current only in "each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. § 16913(a). Congress used present-tense verbs, thus signifying a requirement to register where the offender presently resides, works, or attends school, not where the offender formerly resided, worked, or attended school. Congress further defined the term "resides" in the present tense, and with reference to the offender's home or similar place, 42 U.S.C. § 16911(13), which confirms that an offender is not required to register in a jurisdiction where he formerly resided, worked, or attended school.

Congress's requirement that an offender register or keep his registration current "in person" supports this plain text reading of § 16913. In order to register or keep a registration current "in person," the offender must be present within the jurisdiction, and an offender is present in the jurisdiction where he "resides," works, or attends school, not in a jurisdiction in which he formerly resided, worked, or attended school.

Moreover, Congress gave an offender three business days "after each change of name, residence, employment, or student status" to register or keep a registration current. 42 U.S.C. § 16913(c). The clear import of this three-business-day deadline, triggered by the change of residence, employment, or student status, is to allow an offender sufficient time to report the changes. As applied to a change of residence, for

instance, Congress gives the offender three business days to move to the new residence and then to register or update the registration in the new jurisdiction.

Congress also requires an offender to keep registrations "current," 42 U.S.C. § 16913(c), and a "current" registration would include "current" information, not past or future information. If a sex offender must update a registration in person within the former jurisdiction, in cases involving changes of residence to foreign countries, the sex offender would necessarily update the registration prior to the actual change of residence. In doing so, any "current" information would not be useful. And finally, SORNA does not apply to foreign countries like the Philippines. 42 U.S.C. § 16911(10). Thus, an offender who moves to a foreign country, and who does not work or attend school in a covered SORNA jurisdiction, no longer has an obligation to register or keep his registration current under SORNA. For these reasons, § 16913 does not require a sex offender who moves to a foreign country to register or keep his registration current in a former jurisdiction within the United States.

II. In three respects, SORNA's statutory context, purpose, and history confirm this plain text reading of § 16913. First, in § 16928, Congress instructed the Attorney General and the Secretaries of State and Homeland Security to establish a notification system for offenders "entering the United States," but not "leaving" the United States. Second, SORNA's purpose was to create a "national" sex offender registration system, 42 U.S.C. § 16901, not an

"international" sex offender registration system. Finally, the statutory history confirms that if Congress meant to require a sex offender to inform a former jurisdiction of a change of residence, it would have done so expressly, as it did in the Wetterling Act as amended. This statutory history also confirms that departure-notification provisions go beyond the "minimum standards" found in SORNA and are thus more appropriately considered to be state-law requirements enforced by the states.

III. Section 16913's plain language, when considered in context and with a view to its purpose and history, does not require an offender who moves to a foreign country to register or keep his registration current in his former jurisdiction within the United States. To the extent that § 16913's language is considered ambiguous, any ambiguity should be resolved in Mr. Nichols's favor. In the end, the Tenth Circuit erred when it held that Mr. Nichols committed a federal crime when he failed to update his Kansas registration *after* he moved from Kansas to the Philippines.

ARGUMENT

I. The plain meaning of § 16913 does not require a sex offender who moves to a foreign country to keep his registration current in his former jurisdiction.

Because the question presented is one of statutory interpretation, the analysis begins with the language of the statute. *Dean v. United States*, 556 U.S. 568, 572 (2009). The statute of conviction, 18 U.S.C. § 2250(a), punishes a federal sex offender who "knowingly fails to register or update a registration as required by [SORNA]." Thus, whether Mr. Nichols violated § 2250 turns on the meaning of SORNA's registration requirements in 42 U.S.C. § 16913. *See Lunsford*, 725 F.3d at 860-861; *Murphy*, 664 F.3d at 800.

Section 16913(a) requires a sex offender to register, "and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." Section 16913(c) further defines what it means to keep a registration current:

> [a] sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry.

For six interrelated reasons, these provisions do not require a sex offender who moves to a foreign country to register or keep a registration current in a former jurisdiction within the United States.

A. Congress used present tense verbs to define the jurisdictions where an offender must register and keep the registration current.

"Congress's use of verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992). When interpreting SORNA in *Carr v. United States*, this Court found Congress's use of the present tense in § 2250's travel requirement dispositive. 560 U.S. at 447-448. *Carr* held that the requirement that an offender "travels," rather than "traveled" or "has traveled," "reinforces the conclusion that preenactment travel falls outside the statute's compass." *Id.* Because "the present tense generally does not include the past," "a statute that regulates a person who 'travels' is not readily understood to encompass a person whose only travel occurred before the statute took effect." *Id.* at 448.

Similarly, it is significant that Congress used the present tense in § 16913(a)'s registration requirement to define the jurisdictions in which an offender must register and keep the registration current. An offender must register in the jurisdiction where he "resides," "is an employee," and "is a student." 42 U.S.C. § 16913(a). An offender who changes his residence, employment, or student status must also report

such changes to at least one "involved" jurisdiction. 42 U.S.C. § 16913(c). An "involved" jurisdiction, in turn, is one where the offender "resides," "is an employee," and "is a student." *Id.* (cross-referencing § 16913(a)). This consistent present-tense construction reinforces the conclusion that sex offenders need not register or keep registrations current in jurisdictions in which they formerly resided, worked, or attended school. *Carr*, 560 U.S. at 449 ("[A] statute's undeviating use of the present tense" is "a striking indicator of its prospective orientation.") (quotations omitted). Because § 16913(a) consistently speaks in the present tense, it plainly states that a continuing presence in the jurisdiction is a prerequisite to a duty to keep current a registration within that jurisdiction. *Cf. Otte v. United States*, 419 U.S. 43, 49-50 (1974) (holding that payment of wage provision written in both the past and present tense did not reveal the necessity of a continuing employment relationship).

In *Carr*, this Court noted that § 2250(a)(2)(B) uses the present-tense phrase "resides in Indian country" and found "implausible" a reading of this text that would "encompass persons who once resided in Indian country." 560 U.S. at 449. It is similarly implausible to read § 16913(a) to define the relevant jurisdictions to include those jurisdictions where the sex offender once resided. Instead, § 16913(a) plainly requires a sex offender to register and keep the registration current in the jurisdiction where he "resides," not a jurisdiction where he "resided." *Lunsford*, 725 F.3d at 861. When an offender moves to a

foreign country, he no longer "resides" within the United States. The former jurisdiction is thus no longer a "jurisdiction involved" under § 16913(c), and the offender no longer has an obligation to keep his registration current there. *Lunsford*, 725 F.3d at 861; 73 Fed. Reg. 38030-01 at 38065 (acknowledging that an offender who moves to a foreign country "may no longer be required to register" in his former jurisdiction).

The Tenth Circuit avoided this plain reading of the statute by ignoring *Carr*. Even though this Court decided *Carr* more than a year before the Tenth Circuit's decision in *Murphy*, and even though *Carr* involved the interpretation of present-tense verbs within SORNA, the decision in *Murphy* did not once mention or cite to *Carr*.[7] This critical omission allowed the Tenth Circuit to reach an implausible interpretation of § 16913.

B. Congress also defined "resides" in the present tense and with reference to the location of an individual's home or similar place.

SORNA defines "resides" as "the location of the individual's home or other place where the individual habitually lives." 42 U.S.C. § 16911(13). This present-tense definition confirms that an offender

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[7] Because the panel decision below found itself bound by the decision in *Murphy*, J.A. 125, we focus on *Murphy*, and not the underlying decision, throughout the brief.

must register and keep the registration current only in those jurisdictions in which he presently resides, works, or attends school. *Carr*, 560 U.S. at 447-449; *Lunsford*, 725 F.3d at 861. Had Congress meant to reach beyond jurisdictions where an offender presently "resides," it could have done so by defining "resides" in relation to a past location. But it did not. And because it did not, it is improper to interpret SORNA to require a sex offender who moves to a foreign country to register or update a registration in the jurisdiction where he resided. *Dean*, 556 U.S. at 572 (courts do not read "words or elements into a statute that do not appear on its face").

Moreover, Congress defined "resides" primarily as "the location of one's home." 42 U.S.C. § 16911(13). In common usage, one's home is one's residence. Webster's Encyclopedic Unabridged Dictionary of the English Language 1638 (1996) (defining "residence" as "the place, esp. the house, in which a person lives or resides"); Black's Law Dictionary 1308 ("Place where one actually lives or has his home; a person's dwelling place or place of habitation; an abode; house where one's home is; a dwelling house.") (6th ed. 1990). Thus, when one moves from one home to another home located in a different jurisdiction, by definition, the individual no longer "resides" in the former jurisdiction. 42 U.S.C. § 16911(13). Because the individual now "resides" within a different jurisdiction, SORNA requires the individual to register in that jurisdiction, and not the former jurisdiction. 42 U.S.C. § 16913(a); *Lunsford*, 725 F.3d at 861.

Congress's inclusion of the phrase "or other place where the individual habitually lives" confirms that the offender must register and update his registration in the jurisdiction where the offender's present dwelling place is located. 42 U.S.C. § 16911(13).

The Tenth Circuit made three critical mistakes in its interpretation of the term "resides." First, it all but ignored the statutory definition of "resides'" in § 16911(13). *Murphy*, 664 F.3d at 806 (Lucero, J., dissenting). At no point in its decision in *Murphy* did the Tenth Circuit acknowledge that Congress actually defined "resides" in § 16911(13).[8] Only by sidestepping this definition could the Tenth Circuit conclude, "[w]hen an offender leaves a residence in a state, and then leaves the state entirely, that state remains a jurisdiction involved." 664 F.3d at 803. But, under § 16911(13)'s definition of "resides," this would be true only if the offender still has a home or habitually lives within the state (for instance, if the offender goes on vacation). If the offender moves from the state, it is not true under § 16911(13) that the offender still "resides" in that state. *Murphy*, 664 F.3d at 806 (Lucero, J., dissenting).

Second, the Tenth Circuit also defined "the jurisdiction where the offender resides" in relation to the state where the offender "was still a *resident*" at the time he "abandoned" his home. *Murphy*, 664 F.3d

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[8] The Tenth Circuit cited § 16911(13) once in a footnote, but did so to define "residence," not "resides." 664 F.3d at 800 n.1.

at 803 (emphasis added). But SORNA has nothing to do with an offender's status as a "resident" in a particular state. The word "resident" is nowhere to be found within SORNA. As Judge Lucero aptly explained in his dissent in *Murphy*, the Tenth Circuit's discussion on this point "merely begs the question." *Murphy*, 664 F.3d at 806. If an offender does not have a home or otherwise habitually live in a state, he does not "reside" in that state for purposes of SORNA. *Id.* Even if the offender "might qualify as a resident of the state as the word 'resident' is normally used, [] we must adhere to the definition provided by Congress." *Id.*

Finally, the Tenth Circuit also parsed an odd distinction between the terms "resides" and "residence," referring to the terms as "*two different concepts*." *Murphy*, 664 F.3d at 800. In the Tenth Circuit's view, a person's "residence" is merely the house in which the person lives, while a person "resides" in a broader sense within the jurisdiction where his house is located. *See id.* at n.1. Thus, according to the Tenth Circuit, a person who "abandons" his residence in Kansas nonetheless continues to reside in Kansas, at least, apparently, until he sets foot in a new residence elsewhere.

As a matter of common usage, however, one "resides" *in one's* "residence." Webster's Encyclopedic Unabridged Dictionary of the English Language 1638 (1996) (defining "residence" as "the place, esp. the house, in which a person lives or resides"); Oxford

English Dictionary, Vol. II 517 (1987) (defining "residence" as "to have one's usual dwelling-place or abode; to reside"); Oxford American Dictionary 771 (1980) (defining "residence" as "a place where one resides"). It may well be that the Tenth Circuit was uncomfortable with the idea that a person might not reside anywhere between the time that he closes the door at his old residence and opens the door at his new one. But this residency limbo is exactly what Congress created with § 16913(c)'s three-business-day grace period. *See* Section I(D), *infra*.

Moreover, this common-usage interpretation is borne out in § 16913(a) itself. There, Congress provided that, for initial registration purposes only, a sex offender must also register "in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence." 42 U.S.C. § 16913(a). It is implausible to suggest that the "jurisdiction of residence" referred to in this provision is meant to refer to some jurisdiction different than the jurisdiction where the offender "resides." If that were the case, then the provision would actually provide for registration in the jurisdiction where the offender "resides," the "jurisdiction of residence," and the "jurisdiction in which convicted." But SORNA makes no effort to define "jurisdiction of residence," although it defines "resides." *See* 42 U.S.C. § 16911(13). There is nothing in the statutory text to support the unnatural conclusion that one "resides" somewhere other than

his "residence."[9] Nor is it sensible to conclude that one "resides" where he used to live.

Section 16911(13) is clear: an offender "resides" only in the jurisdiction where his home is located or where he habitually "lives." That definition cannot plausibly extend to an individual who no longer has a home or "lives" within a jurisdiction, even during the time it takes for the person to get from the front door of his former residence across the jurisdiction's state line.

Finally, the Tenth Circuit's definition of "resides" is also inconsistent with the plain meaning of that term. To reside is typically understood as "to dwell permanently or for a considerable time," Webster's Encyclopedic Unabridged Dictionary of the English Language 1638 (1996), or "to settle; to take up one's abode or station," Oxford English Dictionary, Vol. II 517 (1987). An individual who "abandons" a residence in one jurisdiction and moves to another jurisdiction

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[9] The guidelines provide a definition of "residence," but that definition is simply a reiteration of the definition of "resides" in § 16911(13). 73 Fed. Reg. 38030-01 at 38061. To the extent that the guidelines attempt to add meaning to the definition of "resides," they do so only in the context of a sex offender with no fixed abode. *Id.* at 38061-38062. But this case does not involve a homeless or otherwise itinerant offender. Moreover, there is nothing within the guidelines to suggest that this definition has anything to do with an offender who is in the process of moving. Rather, the guidelines make clear that § 16913(c)'s three-business-day grace period covers this latter situation, without any need to augment or modify the statutory requirements. *Id.*

or a foreign country has not "settled" in the former jurisdiction. He has done the opposite. His continued existence within that jurisdiction immediately upon his "abandonment" of his residence does not mean that he still "resides" within that jurisdiction. For SORNA's purposes, one does not "reside" wherever he happens to be. One "resides" in the jurisdiction where his home or similar place is located, and an individual who moves to a home in a different jurisdiction no longer resides within the former jurisdiction. 42 U.S.C. § 16913(a).

C. A sex offender must update changes of residence, employment, and student status "in person" in at least one jurisdiction where the offender resides, works, or attends school.

SORNA not only requires in-person periodic verifications, 42 U.S.C. § 16916, but it also expressly provides that sex offenders who report changes in residence, employment, or student status must do so "in person" in at least one jurisdiction where the offender resides, works, or attends school, 42 U.S.C. § 16913(c). This in-person requirement is statutorily linked to the present-tense language found in § 16913(a). 42 U.S.C. § 16913(c) ("in at least one jurisdiction involved pursuant to subsection (a)").

This "in-person" requirement thus confirms that Congress expects a sex offender to update a registration where the offender "resides," works, or attends

school, not where he resided, worked, or attended school. *See* 73 Fed. Reg. 38030-01 at 38065 (in-person requirement involves a direct meeting "between the sex offenders and the personnel or agencies who will be responsible for their registration."). As a practical matter, an individual has to be "present" in a jurisdiction in order to register or update a registration "in person." It would make little sense for Congress to require a sex offender to update a registration "in person" in a jurisdiction in which the offender no longer resides, works, or attends school. The sex offender would have no reason to be physically present within that jurisdiction.

In a case like this one involving a move to a foreign country, asking the offender to update his registration in Kansas "after [his] change of residence" to the Philippines borders on the impossible. *See* 42 U.S.C. § 16913(c). This Court should not adopt the registration system envisioned by the Tenth Circuit, in which an offender is required to report "in person" to the registration office in Kansas to update the registration after he "abandons" his residence but prior to boarding the plane for his international flight (or bus for his international ride). *See Murphy*, 664 F.3d at 801-802. While the offender is undoubtedly present within Kansas for some period of time, his presence remains only as long as it takes him to depart the jurisdiction. During this brief period, he no longer "resides" in Kansas. Thus, Congress does not require him to update his Kansas registration. *See* Sections I(A) & (B), *supra*.

D. A sex offender has three business days after a change of residence to keep his registration current in the jurisdiction where he presently resides.

SORNA does not generally require a sex offender to update a registration immediately. *See Reynolds*, 132 S.Ct. at 983 (noting that the government's argument "overstates the need for instantaneous registration"). Nor does the plain language of § 16913(c) require sex offenders to report changes in residence, employment, or student status prior to the actual change. Instead, SORNA requires a sex offender to, "not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in information." 42 U.S.C. § 16913(c). This three-business-day deadline allows a sex offender some leeway in keeping his registration current.

When combined with the present-tense verbs used by Congress in § 16913, and Congress's requirement that an offender update a change of residence "in person," the three-business-day deadline in § 16913(c) confirms that an offender need not update a registration in his former jurisdiction. The deadline provides for registration "after" a "change of residence," and a change of residence from one jurisdiction to another eliminates any requirement that the offender update the registration in the jurisdiction

where he used to reside. 42 U.S.C. § 16913(a), (c); *Lunsford*, 725 F.3d at 861-862.

The Tenth Circuit appears to hold that, when a sex offender moves to a different jurisdiction, he must update his registration in the former jurisdiction after he changes his residence but *before* his departure to the new jurisdiction. *Murphy*, 664 F.3d at 800. Yet, this interpretation of § 16913(c) is inconsistent with Congress's inclusion of a grace period in § 16913(c). The obvious purpose of the grace period is to allow the offender an opportunity to move from one residence to another residence and then register or update a sex offender registration. By giving sex offenders this three-business-day grace period, Congress clearly envisions a sex offender registry system in which an offender *first* moves, and *then* registers in the new jurisdiction of residence. 42 U.S.C. § 16913(a), (c); *see* Sections I(A) & (B), *supra*.

It is not uncommon for Congress to use the phrase "not later than . . . after a [specified event]" in setting forth time limitations. *See, e.g.*, 15 U.S.C. § 4305 ("such venture shall, not later than 90 days after a change in its membership, file simultaneously with the Attorney General and the Commission a written notification disclosing such change."); 49 U.S.C. § 31134(d) ("The Secretary may require an employer to update a registration under this section not later than 30 days after a change in the employer's address, other contact information, officers, process agent, or other essential information"). In doing so, it is clear that the specified event (a change

in membership or a change in officers, for example) triggers the applicable time period in which to act.

This Court need look no further than § 16913 itself to confirm this proposition. In § 16913(b)(2), Congress provided for initial registration of a sex offender "not later than 3 business days after being sentenced for the offense, if the sex offender is not sentenced to a term of imprisonment." Because a sex offender either is or is not sentenced to a term of imprisonment at sentencing, the applicable three-business-day deadline is necessarily triggered when the defendant is "sentenced for the offense." Similarly, the specified act at issue here – keeping a registration current – cannot be done until the condition precedent happens – "change of residence, employment, or student status." 42 U.S.C. § 16913(c).

Because the offender is allowed to update the registration up to three business days after the change of residence, it would be inconsistent to require the offender to update the registration in the former jurisdiction. Again, if the offender moves from that jurisdiction, he no longer "resides" there. The Justice Department's guidelines echo this reading of § 16913(c). Specifically, the guidelines expressly acknowledge that "requiring that changes of residence be reported before the sex offender moves, rather than within three business days following the move," would be a "more stringent registration requirement" than SORNA imposes. 73 Fed. Reg. 38030-01 at 38046. Thus, even while encouraging states to impose more stringent requirements, the guidelines

recognize that such requirements neither appear in SORNA nor are enforceable by way of SORNA.

The Tenth Circuit's decision also effectively writes the three-business-day deadline out of the statute when an offender moves to a foreign country. *See Barber v. Thomas*, 560 U.S. 474, 489-490 (2010) ("Because the dissent's approach would require us to read words out of the statute . . . its definition cannot be used here."). The Tenth Circuit's premise is that the former jurisdiction is still a "jurisdiction where the offender resides," but if this is true, there would appear to be no set time in which the former jurisdiction ceases to be a "jurisdiction where the offender resides."

For instance, consider a situation in which an offender, like Mr. Nichols, not only changes his residence in one day, but physically leaves the jurisdiction on that first day. The offender could not plausibly be considered to reside in the former jurisdiction on the second or third days. Yet, the Tenth Circuit insists on this fallacy. *Murphy*, 664 F.3d at 803. In effect, then, under the Tenth Circuit's interpretation, the grace period is not three business days, but rather the amount of time it takes the defendant to depart the jurisdiction. This atextual argument should be rejected. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992) ("We have stated time and again that courts must presume that a legislature says in a

statute what it means and means in a statute what it says there.").[10]

E. A sex offender who changes his residence must update a registration with "current" information, not past or future information.

Section 16913(c) expressly requires a sex offender to keep his registration "current." "Current" is defined as "belonging to the present time, happening now," Oxford American Dictionary 210 (1980), or "belonging in time; belonging to the time actually passing," Webster's Encyclopedic Unabridged Dictionary of the English Language 491 (1996). *See also* Black's Law Dictionary 382 (6th ed. 1990) (*inter alia*, "present existence; now in progress; whatever is at present in course of passage"). When an offender reports

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[10] To the extent that the Tenth Circuit was concerned that registration is necessary in Kansas because the offender temporarily resides there pending his out-of-jurisdiction change of residence, its decision is inconsistent with the guidelines, which require registration of temporary lodging only when the sex offender is away from his residence "for seven or more days." 73 Fed. Reg. 38030-01 at 38056. There is nothing in this case to indicate that Mr. Nichols failed to establish a residence in the Philippines within seven days of his arrival there. And even if there were, Mr. Nichols admitted below that he moved from Kansas to the Philippines. J.A. 17 ("Mr. Nichols flew to the Philippines without any intent to return."). He was not in the Philippines as a vacationing Kansas resident. Once in the Philippines, his registration requirements came to an end. *See* 42 U.S.C. § 16911(10); Section I(F), *infra*.

a change of residence, employment, or student status, he must provide "current" information, not past or future information. For instance, a sex offender who resides in Kansas would report his current Kansas address, whether he intends to move from Kansas or whether he just moved to Kansas from another jurisdiction. At no point would an offender report "past" or "future" information when "[k]eeping the registration current" for purposes of § 16913(c).

The only time in which § 16913 expressly requires a sex offender to provide future information is during initial registration prior to release from imprisonment, when the offender "is not yet residing in the place or location to which he or she expects to go following release." 73 Fed. Reg. 38030-01 at 38055 (explaining § 16914(a)(3)'s requirement to report the address where the offender "resides or will reside"); 42 U.S.C. § 16913(a).[11] In contrast, § 16913(c) opts for "current" information, with an instruction to the jurisdiction to "immediately provide" this current information to other jurisdictions. *See also* 42 U.S.C. §§ 16919, 16921 (providing additional requirements for jurisdictions to update information amongst

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[11] Section 16914 also sets forth additional information a sex offender must provide in his registration, but this information is a separate requirement than the change-of-residence information required by § 16913. *See* 73 Fed. Reg. 38030-01 at 38067. The government's theory below was that Mr. Nichols violated SORNA when he failed to update his sex offender registration *after* he moved from Kansas, not *before* he moved from Kansas, thus implicating § 16913, not § 16914.

themselves). Because the Tenth Circuit's decision effectively requires a sex offender to report a future residence, not a current residence, it is inconsistent with § 16913(c)'s text.

Moreover, if the Tenth Circuit is correct, and a sex offender who moves from Kansas to a different jurisdiction or a foreign country must still update his registration in person in Kansas with "current" information, it is unclear what information the sex offender would be required to provide. The offender could not report his *past* Kansas residence because he no longer "resides" there (nor would it be a "change of residence"). Nor could the offender sensibly report his *future* residence as his "current" residence. 42 U.S.C. § 16911(13). He arguably would not have a "current" residence while traveling from one residence to the other.

Congress could not have intended such a confused system. A "change of residence" is not so broad as to include every step a sex offender takes while in the process of changing residences. Congress took a more common sense approach than that: a sex offender who changes his residence has three business days to report that change to the jurisdiction where he resides, not to his former jurisdiction.[12]

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[12] Again, this case has nothing to do with the problem of homeless or itinerant offenders. Mr. Nichols was neither homeless nor itinerant. No doubt, homeless or itinerant offenders pose problems for any registration system. But those problems

(Continued on following page)

F. A foreign country is not a SORNA jurisdiction.

Again, SORNA requires a sex offender who changes his residence to update his registration in person "in at least 1 jurisdiction involved" "not later than 3 business days after each change of name, residence, employment, or student status." 42 U.S.C. § 16913(c). "Involved" jurisdictions are jurisdictions in which an offender presently "resides," "is an employee," or "is a student." 42 U.S.C. § 16913(a). But a "jurisdiction" under SORNA does not include a foreign country like the Philippines. 42 U.S.C. § 16911(10) (defining "jurisdiction" as a state, the District of Columbia, a United States territory, or a federally recognized Indian tribe).

Consequently, once an offender no longer "resides," "is an employee," or "is a student" in the United States, there are no longer any jurisdictions "involved" in which to keep the registration current. In other words, when a sex offender, like Mr. Nichols, moves to a foreign country, he is no longer subject to SORNA's registration requirements. 42 U.S.C. § 16911(10); *Lunsford*, 725 F.3d at 861; *see also EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent

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are not raised in this case. *Cf.*, *Murphy*, 664 F.3d at 801 n.2 (discussing registration requirements of "itinerant[s]" or "peripatetic[s]").

appears, is meant to apply only within the territorial jurisdiction of the United States.'").

As a practical matter, then, a sex offender is no longer required by SORNA to register or keep a registration current after a change of residence to a foreign country. Without this continued registration requirement, sex offender registries cannot possibly include "current" information for offenders who reside in foreign countries. If the offender, *inter alia*, changes his residence within the foreign country, moves to a different foreign country, obtains a new job overseas, or enrolls at a foreign school, this information will not be reflected on any sex offender registry. *See Murphy*, 664 F.3d at 804. Considering this, it becomes even more implausible to interpret § 16913(c) to require a sex offender to update a registration "after" a change of residence to a foreign country.

In the end, the Tenth Circuit's decision – requiring a sex offender to report a change of residence to a former jurisdiction – is an atextual gloss on § 16913. In plain terms, that provision requires an offender to register or keep a registration current in each jurisdiction where the offender presently resides, works, or attends school. If an offender changes his residence, work, or school, he has three business days to report that change to at least one jurisdiction where he resides, works, or attends school. But if the change of residence is to a foreign country (and the offender does not work or attend school within the United States), the sex offender moves beyond SORNA's

reach. Section 16913 is clear on this. The Tenth Circuit's contortions aside, Mr. Nichols had no federal obligation to register under SORNA's plain language when he moved from Kansas to the Philippines. And because he had no federal obligation to register under SORNA, he did not violate § 2250(a).

II. SORNA's statutory context, purpose, and history confirm that a sex offender who moves to a foreign country need not register or keep his registration current in a former jurisdiction within the United States.

"[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). The statute's history and purpose are also relevant to its meaning. *United States v. Quality Stores, Inc.*, 134 S.Ct. 1395, 1401 (2014); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011).

A. SORNA does not expressly regulate offenders who leave the United States.

Unlike its predecessors, SORNA is not entirely silent on sex offenders and foreign countries. In 42 U.S.C. § 16928 – "Registration of sex offenders entering the United States" – Congress directed the Attorney General, in consultation with the Secretaries of State and Homeland Security, "to establish and

maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under [SORNA]." In contrast, no provision similar to § 16928 exists with respect to persons *leaving* the United States.

Congress's omission of "leaving" in § 16928 is significant because it demonstrates that Congress could have provided for a system to inform the relevant jurisdictions about persons "entering or leaving" the United States, but did not. "The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Texts* 93 (2012). An "absent provision cannot be supplied by the courts." *Id.* at 94. As a matter of statutory interpretation, "[t]o supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926).

In fact, Congress knew how to draft a more encompassing provision, and it did just that in another provision of the Adam Walsh Act, punishing a sex offender who "enters or leaves" Indian country. 18 U.S.C. § 2250(a)(2)(B). In light of its inclusion of "leaves" in § 2250(a)(2)(B), there is no reason to think that Congress's exclusion of "leaving" in § 16928 was accidental. *See, e.g.*, *Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). And if

"entering the United States" in § 16928 actually means "entering or leaving the United States," then Congress's reference to "enters or leaves" in § 2250(a)(2)(B) renders the term "leaves" impermissibly superfluous. *United States v. Butler*, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used.").

Instead, Congress's exclusion of "leaving" in § 16928 makes perfect sense. Sex offenders who *enter* the United States must register within three business days in jurisdictions where they reside, work, or attend school. 42 U.S.C. § 16913(c); *see also* 73 Fed. Reg. 38030-01 at 38065. For this reason, it is understandable that Congress would want to establish a notification system for offenders entering the country.

But there is no similar rationale for offenders *leaving* the country. SORNA's registration requirements do not apply to offenders who reside in foreign countries. 42 U.S.C. §§ 16911(10), 16913. Because these offenders will have no registration obligations under SORNA, *see* Section I(F), *supra*, it makes sense that Congress would exclude such offenders from § 16928's reach. Similarly, there would be no meaningful reason for Congress to require an offender to notify former jurisdictions of an international change of residence. *Lunsford*, 725 F.3d at 863 (observing that "when a sex offender leaves the country, he no longer poses an immediate threat to the safety of children in the United States").

Section 16928 is also important because it ensures that, if a sex offender who moves to a foreign country ever returns to the United States, the Attorney General and the Secretaries of State and Homeland Security will require him to register as a sex offender under § 16913(a). In this manner, and not via registration requirements for offenders who leave the country, SORNA's primary purpose – to create a "national" registration system in order to protect the public from sex offenders – is fulfilled. *See* 42 U.S.C. § 16901; Section II(B), *infra*.[13]

Finally, in § 2250(a), Congress made it a federal crime for a sex offender to travel in foreign commerce, and then fail to register as required by SORNA. 18 U.S.C. § 2250(a)(2)(B), (a)(3). *Carr* makes clear that the offender must first travel, and then fail to register, in order to violate this provision. 560 U.S. at 446. As a practical matter, this provision would apply to a sex offender who *enters* the United States and then fails to register, but not to an offender, like Mr. Nichols, who first fails to register and then *leaves* the

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[13] The 21-day travel notification provision in the supplemental guidelines also supports this point. 76 Fed. Reg. 1630-01 at 1633-1634. This information is relevant to § 16914, not § 16913, and so it is not information related to a "change of residence." 76 Fed. Reg. 1630-01 at 1637. The premise of the travel notification provision is thus that the offender will return to his home within the United States. Tracking that offender is different from tracking an offender who leaves the United States for good. The former is still subject to SORNA because he still resides within the United States, even while he vacations, works, etc., in a foreign country.

United States.[14] This disparate treatment is consistent with a reading of § 16913 that does not require a sex offender to register or keep a registration current in the former jurisdiction, but rather only to register or keep the registration current in the new jurisdiction.

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[14] At one point, the Justice Department's guidelines purport to rely on § 16928 and § 2250 as authority to supplement SORNA's requirements with a departure notification requirement. 73 Fed. Reg. 38030-01 at 38066. But § 16928 applies only to offenders "entering" the United States, not leaving the United States, and its aim is to ensure those people register, an aim that is impossible to achieve for offenders who move to foreign countries. Moreover, § 2250 is an enforcement provision, not a registration provision. Requiring additional registration information could not possibly be premised on an entirely separate enforcement provision.

In any event, the departure notification provision recommended by the guidelines would supplement SORNA's "minimum standards," not define those minimum standards. *Id.* at 38046. To the extent that one might read the guidelines to establish a federal obligation under SORNA, this would raise serious concerns about whether the guidelines deserve any deference whatsoever. *Lunsford*, 725 F.3d at 861 ("Neither the National Guidelines nor the government's brief in this case, however, grapple effectively with the language of the statute on this point, and we conclude that the text forecloses the government's position."); *see also Chevron USA Inc. v. Nat. Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) (no agency deference when Congress has spoken on the issue presented); *Reynolds*, 132 S.Ct. at 986 (Scalia, J., dissenting) (suggesting that SORNA's delegation to the Attorney General to decide "whether a criminal statute will or will not apply to certain individuals" arguably violates the nondelegation doctrine).

B. A requirement that an offender notify his former jurisdiction that he has moved to a foreign country would not meaningfully advance SORNA's purposes.

SORNA's stated purpose is to establish a "comprehensive national" sex offender registration and notification system in order to protect the public (particularly children) from sex offenders. 42 U.S.C. § 16901. The seventeen instances of crimes against children enumerated in § 16901 all occurred within the United States. *Id.* There is no doubt that the protection of children is a laudable purpose, whether such children live in the United States or abroad. But there can also be no serious doubt that SORNA's purposes were never expressed in terms of the protection of children in other countries, and no reason to think that keeping a registration current in Kansas or some other jurisdiction would protect children in foreign countries.

Again, § 16901 is explicit: Congress sought to establish a "national" sex offender registration system, not an "international" sex offender registration system, and it did so in light of various crimes committed against children *within* the United States. In § 16928, Congress established a notification system for offenders *entering* the country, not for offenders *leaving* the country. And foreign countries are simply not covered jurisdictions under SORNA. 42 U.S.C. § 16911(10). As the Justice Department candidly admits, as currently drafted, a sex offender who moves to a foreign country "may not be subject to any

enforceable registration requirement under U.S. law unless and until he or she returns to the United States." 73 Fed. Reg. 38030-01 at 38066.

The guidelines set forth additional purposes served by SORNA, including: (1) tracking sex offenders "following their release into the community" "as they move among jurisdictions"; (2) assisting law enforcement in solving crimes against children; (3) deterring sex offenders from committing additional crimes; and (4) making information available to the community so that individuals can "take common sense measures" to protect their children (like decline an offer to babysit or head a youth group). 73 Fed. Reg. 38030-01 at 38044-38045.[15] But these purposes do not readily apply to sex offenders in foreign countries.

Instead, the first purpose concerns *interstate* tracking of sex offenders, not *international* tracking of sex offenders. There is also nothing within the

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[15] To the extent that it is considered, the legislative history also indicates that certain members of Congress were concerned with "missing" sex offenders (i.e., offenders not in compliance with sex offender registries), but even this concern was tied to interstate travel, not international travel. *See Carr*, 560 U.S. at 454-455. The legislative history is silent with respect to SORNA's application to offenders in foreign countries (no members of Congress cited the need to protect children in foreign countries as a reason to pass SORNA). Indeed, if Congress, as a whole, shared a concern about tracking sex offenders outside of the country, it surely would have regulated offenders "leaving" the United States via § 16928.

guidelines to suggest that the crime-control purposes are aimed at crimes committed outside of the United States. Finally, any "common sense measures" taken by the community would be taken *within* the community, not in foreign countries. Although somewhat perverse, the reality is that a sex offender in a foreign country actually furthers many of these stated purposes because there is no possibility that the sex offender will harm children within the United States. *See, e.g.*, *Lunsford*, 725 F.3d at 863 ("The government asserts no policy interest under SORNA in monitoring the offender's subsequent movements among foreign jurisdictions.").[16]

As Judge Lucero mentioned in dissent, it was arguably an "unspoken concern that Congress drafted SORNA with a loophole" that encouraged the Tenth Circuit to "rewrite the statute." *Murphy*, 664 F.3d at

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[16] Since SORNA's enactment in 2006, members of Congress have sought to amend § 16913 to include a registration provision for international travel, as well as to amend § 2250 to provide a federal enforcement provision for international travel. *See, e.g.*, Sex Offender Notification of International Travel Act, H.R. 6266, 111th Cong. (2010); Int'l Megan's Law of 2009, H.R. 1623, 111th Cong. (2009); Int'l Megan's Law of 2010, H.R. 5138, 111th Cong. Rec. H6087 (daily ed. July 27, 2010); Int'l Megan's Law to Prevent Demand for Child Sex Trafficking, H.R. 515 §§ 4, 7, 114th Cong. (2015); Int'l Megan's Law to Prevent Child Exploitation Through Advanced Notification of Traveling Sex Offenders, S. 1867, 114th Cong. (2015) (introduced July 27, 2015). Unlike SORNA, this legislation is aimed at protecting children in other countries (principally from so-called sex tourism). This proposed legislation eliminates any suggestion that one of SORNA's purposes was to protect children in foreign countries.

807. But this "loophole" is overstated. Although the change of residence to a foreign country effectively removes the offender from SORNA's requirements, it is not as if the government is unaware when an offender leaves the country, as one can only do so using a passport issued by the State Department. *See* 22 U.S.C. § 211a.[17] The guidelines require states to collect passport information in order to track and identify offenders "who leave the United States." 73 Fed. Reg. 38030-01 at 38056. Since 2009, U.S. Customs has provided to federal law enforcement officials "information such as name, date of birth, destination, and offense, on all registered sex offenders" identified from passenger data.[18] The government is thus aware when a registered sex offender crosses an international border, knowledge it does not have for interstate travel.

As a practical matter, the sex offender in a foreign country is essentially analogous to a sex offender who has died. Both are beyond the reach of SORNA,

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[17] For a compelling read on the extent to which the government tracks its citizens traveling internationally, *see* Sean O'Neill, *A rare peek at Homeland Security's files on travelers*, Budget Travel's Blog, *at* http://www.budgettravel.com/blog/a-rare-peek-at-homeland-securitys-files-on-travelers,10313/ (last visited December 19, 2015).

[18] USGAO, *Registered Sex Offenders: Sharing More Information Will Enable Federal Agencies to Improve Notifications of Sex Offenders' International Travel* 17 (February 2013), *available at* http://www.gao.gov/assets/660/652194.pdf; *see also* 19 C.F.R. § 122.75a (directing commercial airlines to transmit passenger manifests to U.S. Customs and Border Patrol).

but nonetheless easy to trace. With respect to the latter, the guidelines encourage jurisdictions "to promptly update the information in the registry . . . to reflect the registrant's death" when such an offender fails to appear for a scheduled update. 73 Fed. Reg. 38030-01 at 38068. The guidelines presume that the offender's failure to appear will prompt a simple vital records search, which will in turn alert the jurisdiction to the offender's death. Jurisdictions can just as easily search (or ask the federal government to search) the international travel records of a missing offender. 73 Fed. Reg. 38030-01 at 38068; *see* n.17, *supra*.

In the end, it is not unheard of for Congress to "leave some matters uncovered" when drafting legislation. *See* Scalia & Garner at 57. "[T]he limitations of a text – what a text chooses *not* to do – are as much a part of its 'purpose' as its affirmative dispositions. These exceptions or limitations must be respected, and the only way to accord them their due is to reject the replacement or supplementation of text with purpose." *Id.* at 57-58. Here, despite the value in seeking to protect children in foreign countries, there is nothing within SORNA's text, legislative history, or statutory history to indicate that Congress intended to do so when it passed SORNA. Without that purpose, it should come as no surprise that § 16913's registration requirements do not reach sex offenders, like Mr. Nichols, who move to foreign countries.

C. SORNA's statutory history confirms that SORNA does not require an offender to register or keep a registration current in a former jurisdiction when the offender moves to a foreign country, and, to the extent that this supplemental requirement exists, it is enforced by the states, not the federal government.

SORNA's statutory history is important for two reasons. First, it demonstrates that Congress knew how to draft a departure notification provision, but chose not to include such a provision in SORNA. Second, it demonstrates that such provisions are supplemental requirements enforced by the states, not the federal government.

1. Unlike the Wetterling Act as amended, SORNA does not require a sex offender to report a change of residence to the jurisdiction "the person is leaving."

The Wetterling Act and SORNA share many similarities. *See Kebodeaux*, 133 S.Ct. at 2504-2505. With respect to registration requirements, SORNA includes a modified grace-period provision like the one found in the Wetterling Act (the original version and as amended). *Compare* 42 U.S.C. § 16913, *with* 42 U.S.C. § 14071(a), (b)(5) (1994), 42 U.S.C. § 14072(g)(3), (i)(3), (i)(4) (2000). The provisions similarly require sex offenders to register "current" addresses and to register new addresses in different states within

some set amount of time (ten days under the Wetterling Act; three business days under SORNA) in the new state or jurisdiction (where the offender "resides," works, or attends school), but not the former state or jurisdiction. *Id.* State registries notified of changes of residence have a further duty to notify law enforcement officials and jurisdictions "from which" and "to which" the offender relocated. *Compare* 42 U.S.C. § 14072(g)(4), (5) (2000), *with* 42 U.S.C. § 16921(b)(3).

Although similar in many respects, SORNA differs from the Wetterling Act as amended in one significant respect. Whereas the original version of § 14071(b)(5) of the Wetterling Act directed states to require offenders to register within ten days of a change of residence in the new state, in 1997, Congress amended § 14071(b)(5) to direct states to require an offender who moves to another state to "report the change of address to the responsible agency in the State the person is leaving." Pub. L. No. 105-119, Tit. I, 111 Stat. 2440. When Congress enacted SORNA, however, it did not adopt or otherwise include a similar departure notification provision in the legislation. There is no provision within SORNA that requires a sex offender who moves to a different jurisdiction or to a foreign country to report the change of residence to the jurisdiction "the person is leaving." Congress chose the Wetterling Act's grace-period structure instead. 42 U.S.C. § 16913(c).

This statutory history thus demonstrates that Congress knew how to draft a departure notification

provision but chose not to do so in SORNA. Indeed, Congress repealed such a provision when it enacted SORNA. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Quality Stores, Inc.*, 134 S.Ct. at 1401. In *Quality Stores*, for instance, this Court refused to read into a statute an exception that once existed, but that Congress later repealed. *Id.* So too here, this Court should refuse to read into SORNA a provision that once existed but that Congress later repealed. *See Kebodeaux*, 133 S.Ct. at 2504-2505 (applying SORNA's provisions, rather than the Wetterling Act's provisions, to a federal sex offender convicted before SORNA's enactment); *id.* at 2510 (Scalia, J., dissenting) (referring to the proposition that "SORNA is designed to carry the Wetterling Act into execution" as "obviously untrue").

This is particularly true here because, by the time Congress enacted SORNA, it had not just the Wetterling Act as a model, but also a variety of state registry laws from which to choose. *See* notes 1 & 2, *supra*. Two states explicitly required departure notification for moves *to foreign countries*. W. Va. Code § 15-12-7 (2004); Wash. Rev. Code § 9A.44.130(4)(a)(ix) (2003). Congress easily could have drafted a similar provision in SORNA. But Congress instead chose a system in which offenders would report changes of residence "after" the change and to the jurisdiction in which the offender "resides," not to the jurisdiction in which the offender formerly resided. *See* Section I, *supra*. Congress's decision deserves deference.

Quality Stores, Inc., 134 S.Ct. at 1401; *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-580 (2006) ("Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation.").

Moreover, SORNA's statutory history demonstrates that Congress knows how to amend a registration law to include a departure notification provision. *Compare* 42 U.S.C. § 14071(b)(5) (1994), *with* 42 U.S.C. § 14071(b)(5) (1998). Yet, in the last nine years, although Congress has added three additional provisions to SORNA, *see* 42 U.S.C. §§ 16915a & 16915b (added in 2008); 42 U.S.C. § 16928a (added in 2015), it has not amended SORNA to include a departure notification provision. *See, e.g.*, *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) (refusing to interpret a statute a certain way because Congress demonstrated that it knew how to provide for that interpretation of the statute but did not.). Nor has Congress amended SORNA to address offenders living abroad, even though it just added § 16928a to address military sex offenders.[19]

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[19] In his concurrence in *Kebodeaux*, Justice Alito explained that states have no authority to require military tribunals or military officials to notify state registries when military sex offenders are released from prison. 133 S.Ct. at 2509. Justice Alito suggested that this "may create a gap in the" sex offender registry laws. *Id.* Less than two years later, Congress enacted § 16928a, requiring the Secretary of Defense to notify the Attorney General of military personnel who are required to register under SORNA. The Attorney General, in turn, is obligated to

(Continued on following page)

This statutory history consistently undermines the Tenth Circuit's decision below and in *Murphy*. Had Congress wanted a provision like the one the Tenth Circuit crafted, requiring an offender to report a change of residence to the former jurisdiction, it would have enacted the provision on its own.

2. Any departure notification requirement is a supplemental requirement enforced by the states, and not one "required by" SORNA.

The amended Wetterling Act's departure notification provision was not a federally enforced provision. The provision was codified in § 14071, not § 14072, and only § 14072 created a federal penalty for failure to register. *Compare* 42 U.S.C. § 14071(d), *with* 42 U.S.C. § 14072(i). In states that codified § 14071(b)(5) (requiring, *inter alia*, notification that a "person is leaving" the state), an offender's failure to abide by it could result in state prosecution, not federal prosecution. 42 U.S.C. § 14071(d); *see Carr*, 560 U.S. at 452-453. Unlike § 14071(b)(5), § 14072 did not require an offender to notify the former state of the change of

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notify "all relevant jurisdictions" of this information. 42 U.S.C. § 16919(b). Thus, Congress' passage of § 16928a confirms that Congress, not courts, fill perceived legislative gaps. *See* Scalia & Garner at 95-96. ("The search for what the legislature 'would have wanted' is invariably either a deception or a delusion. What is a gap anyway?" "Judicial amendment flatly contradicts democratic self-governance.").

residence. Instead, a state agency was required to notify "law enforcement officials of the jurisdiction to which, and the jurisdiction from which, the person has relocated." 42 U.S.C. § 14072(g)(4), (5) (1998).

Not surprisingly, SORNA adopted a registration system similar to the federally enforced registration requirements in the Wetterling Act as amended. *See Kebodeaux*, 133 S.Ct. at 2501, 2504-2505. Again, while Congress shortened the Wetterling Act's ten-day deadline to register a new address to a three-business-day deadline, it left intact the requirement to register where an offender "resides," works, or attends school. *Compare* 42 U.S.C. § 14071(b)(5), 42 U.S.C. § 14072(g)(3), & 42 U.S.C. § 14072(i)(3), (4) *with* 42 U.S.C. § 16913(a), (c). Moreover, it is still the responsibility of the jurisdiction to provide any updated information on a sex offender to the Attorney General, each jurisdiction where the offender resides, works, or attends school, and, *inter alia*, "each jurisdiction *from or to which* a change of residence, employment, or student status occurs." *Compare* 42 U.S.C. § 16921(b)(1), (2), (3) (emphasis added), *with* 42 U.S.C. § 14071(b)(5). SORNA also adopts the amended Wetterling Act's bifurcated enforcement scheme. 42 U.S.C. § 16913(e); 18 U.S.C. § 2250(a).

This statutory history demonstrates that departure notification provisions have historically been a part of state law, not federal law. 42 U.S.C. § 14071(d). If an offender is required to give departure notification to the jurisdiction where he resides, or the jurisdiction where he resided, this requirement

comes from state law, and the failure to abide by the requirement must be prosecuted in state court, not federal court. *See Reynolds*, 132 S.Ct. at 979 (failure to give Missouri authorities notification of move to Pennsylvania "as Missouri law required"); Scalia & Garner at 290 ("A federal statute is presumed to supplement rather than displace state law."). There is no need to adopt a contorted interpretation of § 16913 to include a similar federal obligation when that obligation exists under state law. *See, e.g.*, Kan. Stat. Ann. § 22-4905(g); *Kebodeaux*, 133 S.Ct. at 2513 (Thomas, J., dissenting) ("The power to protect society from sex offenders is part of the general police power that the Framers reserved to the States or the people.").

The Justice Department's guidelines recognize this point. The guidelines note that a "jurisdiction may require that changes in registration information be reported by registrants on a more stringent basis than the SORNA minimum standards – *e.g.*, requiring that changes of residence be reported before the sex offender moves, rather than within three business days following the move." 73 Fed. Reg. 38030-01 at 38046. Beyond SORNA's "minimum standards," "the manner in which sex offenders are to report other changes in registration information is a matter within jurisdictions' discretion." *Id.* at 38044. The guidelines explicitly apply this rationale to "sex offenders who leave the United States." *Id.* at 38067 (noting

that such changes of residence are not ones "between or within jurisdictions" for purposes of SORNA).[20]

When SORNA is understood in light of its history, the Tenth Circuit's perceived "loophole," *Murphy*, 664 F.3d at 807 (Lucero, J., dissenting), is no loophole at all. State registration laws sufficiently fill any perceived gap in federal coverage. *See* notes 1 & 2, *supra*. If Mr. Nichols had an obligation to give the state of Kansas notification of his change of residence to the Philippines, that obligation arose under state law, not SORNA. *See* Kan. Stat. Ann. § 22-4905(g); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

III. Any ambiguity in the statute must be resolved in favor of Mr. Nichols.

As explained above, SORNA's text plainly does not turn Mr. Nichols's failure to inform Kansas of his move to the Philippines into a federal crime. Because

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[20] Moreover, as mentioned above, legislation proposed since SORNA's enactment has sought to amend § 16913 to include a registration provision for international travel, as well as to amend § 2250 to provide a federal enforcement provision for international travel. *See* note 16, *supra*. It would make little sense for members of Congress to introduce such legislation if SORNA already required these things.

Kansas was a former jurisdiction, Mr. Nichols had no federal obligation to report a change of residence to Kansas. A different statutory reading, one that would subject Mr. Nichols to federal prosecution for moving to a foreign country without informing Kansas, would be highly doubtful. And doubt about the substantive scope of a federal statute must be resolved in favor of Mr. Nichols.

"Ambiguous criminal laws are to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). This "ensures that criminal statutes will provide fair warning of what constitutes criminal conduct, minimizes the risk of selective or arbitrary enforcement, and strikes the appropriate balance between the legislature and the court in defining criminal liability." *United States v. Valle*, ___ F.3d ___, 2015 WL 7774548 at *13 (2d Cir. Dec. 3, 2015) (citing *Yates v. United States*, 135 S.Ct. 1074, 1088 (2015)). Congress, after all, drafts and enacts statutes. Its responsibility is to write laws in "language that is clear and definite," *Yates*, 135 S.Ct. at 1088, so as to identify the boundaries of criminal conduct that should be penalized. This ensures that legislatures, not courts, define criminal liability. *Liparota v. United States*, 471 U.S. 419, 427 (1985).

"[W]here text, structure, and history fail to establish that the Government's position is *unambiguously correct*," the rule of lenity resolves the ambiguity in the defendant's favor. *United States v. Granderson*, 511 U.S. 39, 54 (1994) (emphasis added). This "venerable

rule" assures that "no citizen shall be held accountable for a violation of a statute whose commands are uncertain. . . ." *Santos*, 553 U.S. at 514. A law must clearly inform what conduct is criminalized: "A fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). And when Congress fails to make that line clear, the rule of lenity requires the Court to draw it to the defendant's benefit.

The rule also serves a corrective role. By placing the burden on the government, "the weight of inertia [is] upon the party that can best induce Congress to speak more clearly and keep courts from making laws in Congress's stead." *Santos*, 553 U.S. at 514. When Congress speaks "in language that is clear and definite," courts may impose the harsher alternative construction. *United States v. Bass*, 404 U.S. 336, 347 (1971). But when Congress fails to unambiguously define criminal activity, courts are forced to sort out the matter. *Id.* at 348. And in that instance, because the Court "does not play the part of a mindreader," *Santos*, 553 U.S. at 515, the rule of lenity resolves ambiguity in favor of the defendant.

Even when the Court may divine plausible alternative constructions of an uncertain statute, the rule of lenity calls for the Court to "reject the impulse to speculate regarding dubious Congressional intent." *Santos*, 553 U.S. at 514 (quoting *United States v.*

Wiltberger, 18 U.S. 76, 105 (1820)). The law does not allow for a preponderance or even probability appraisal of Congress's objective. "Probability is not a guide which a court, in construing a penal statute, can safely take." *Id.*

There is nothing in SORNA's text, purpose, or statutory history that unambiguously demonstrates Congress's intent to criminalize Mr. Nichols's conduct in this case. SORNA's registration provisions do not require an offender to update his registration in jurisdictions where he no longer resides. 42 U.S.C. § 16913. And that is particularly true when a sex offender no longer resides in a SORNA-covered jurisdiction. 42 U.S.C. §§ 16911(10), 16928. If nothing else, the rule of lenity cautions against criminalizing conduct not clearly required by Congress. *Bass*, 404 U.S. at 348 (noting the "instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.").

CONCLUSION

For the above-stated reasons, this Court should reverse the Tenth Circuit's judgment affirming Mr. Nichols's conviction.

Respectfully submitted,

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STATUTORY APPENDIX

18 U.S.C.A. § 2250

Failure to register

(a) In general. – Whoever –

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act; shall be fined under this title or imprisoned not more than 10 years, or both.

(b) Affirmative defense. – In a prosecution for a violation under subsection (a), it is an affirmative defense that –

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

(c) **Crime of violence.** –

(1) **In general** – An individual described in subsection (a) who commits a crime of violence under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States shall be imprisoned for not less than 5 years and not more than 30 years.

(2) **Additional punishment.** – The punishment provided in paragraph (1) shall be in addition and consecutive to the punishment provided for the violation described in subsection (a).

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42 U.S.C.A. § 16901

Declaration of purpose

In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders:

(1) Jacob Wetterling, who was 11 years old, was abducted in 1989 in Minnesota, and remains missing.

(2) Megan Nicole Kanka, who was 7 years old, was abducted, sexually assaulted, and murdered in 1994, in New Jersey.

(3) Pam Lychner, who was 31 years old, was attacked by a career offender in Houston, Texas.

(4) Jetseta Gage, who was 10 years old, was kidnapped, sexually assaulted, and murdered in 2005, in Cedar Rapids, Iowa.

(5) Dru Sjodin, who was 22 years old, was sexually assaulted and murdered in 2003, in North Dakota.

(6) Jessica Lunsford, who was 9 years old, was abducted, sexually assaulted, buried alive, and murdered in 2005, in Homosassa, Florida.

(7) Sarah Lunde, who was 13 years old, was strangled and murdered in 2005, in Ruskin, Florida.

(8) Amie Zyla, who was 8 years old, was sexually assaulted in 1996 by a juvenile offender in Waukesha, Wisconsin, and has become an advocate for child victims and protection of children from juvenile sex offenders.

(9) Christy Ann Fornoff, who was 13 years old, was abducted, sexually assaulted, and murdered in 1984, in Tempe, Arizona.

(10) Alexandra Nicole Zapp, who was 30 years old, was brutally attacked and murdered in a public restroom by a repeat sex offender in 2002, in Bridgewater, Massachusetts.

(11) Polly Klaas, who was 12 years old, was abducted, sexually assaulted, and murdered in 1993 by a career offender in California.

(12) Jimmy Ryce, who was 9 years old, was kidnapped and murdered in Florida on September 11, 1995.

(13) Carlie Brucia, who was 11 years old, was abducted and murdered in Florida in February, 2004.

(14) Amanda Brown, who was 7 years old, was abducted and murdered in Florida in 1998.

(15) Elizabeth Smart, who was 14 years old, was abducted in Salt Lake City, Utah in June 2002.

(16) Molly Bish, who was 16 years old, was abducted in 2000 while working as a lifeguard in Warren, Massachusetts, where her remains were found 3 years later.

(17) Samantha Runnion, who was 5 years old, was abducted, sexually assaulted, and murdered in California on July 15, 2002.

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42 U.S.C.A. § 16911

Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators

In this subchapter the following definitions apply:

(1) Sex offender

The term "sex offender" means an individual who was convicted of a sex offense.

(2) Tier I sex offender

The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender

The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and –

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of Title 18);

(ii) coercion and enticement (as described in section 2422(b) of Title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of Title 18;

(iv) abusive sexual contact (as described in section 2244 of Title 18);

(B) involves –

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) Tier III sex offender

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and –

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or

(ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

(5) Amie Zyla expansion of sex offense definition

(A) Generally

Except as limited by subparagraph (B) or (C), the term " sex offense" means –

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18;

(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

(B) Foreign convictions

A foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 16912 of this title.

(C) Offenses involving consensual sexual conduct

An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the

offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

(6) Criminal offense

The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators

The term "specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of Title 18.

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

(8) Convicted as including certain juvenile adjudications

The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of Title 18), or was an attempt or conspiracy to commit such an offense.

(9) Sex offender registry

The term "sex offender registry" means a registry of sex offenders, and a notification program, maintained by a jurisdiction.

(10) Jurisdiction

The term "jurisdiction" means any of the following:

(A) A State.

(B) The District of Columbia.

(C) The Commonwealth of Puerto Rico.

(D) Guam.

(E) American Samoa.

(F) The Northern Mariana Islands.

(G) The United States Virgin Islands.

(H) To the extent provided and subject to the requirements of section 16927 of this title, a federally recognized Indian tribe.

(11) Student

The term "student" means an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education.

(12) Employee

The term "employee" includes an individual who is self-employed or works for any other entity, whether compensated or not.

(13) Resides

The term "resides" means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives.

(14) Minor The term "minor" means an individual who has not attained the age of 18 years.

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42 U.S.C.A. § 16913

Registry requirements for sex offenders

(a) In general

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration

The sex offender shall initially register –

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b) of this section

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

(e) State penalty for failure to comply

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

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42 U.S.C.A. § 16928

Registration of sex offenders entering the United States

The Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, shall establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under this subchapter. The Secretary of State and the Secretary of Homeland Security shall provide such information

and carry out such functions as the Attorney General may direct in the operation of the system.